

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD No. 6394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)	
DIVISION – IBT RAIL CONFERENCE)	Case No. 153
)	
and)	
)	Award No. 153
NORFOLK SOUTHERN RAILWAY COMPANY (FORMER)	
NORFOLK & WESTERN RAILWAY COMPANY))	

Richard K. Hanft, Chairman and Neutral Member
Adam Lively, Carrier Member
Adam Gilmour, Organization Member

STATEMENT OF CLAIM: “Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline [forty-five (45) day actual suspension] of Mr. R. Hanratty, by letter dated September 25, 2017, in connection with his alleged failure to follow instructions and insubordination in that on Thursday, August 10, 2017, he was instructed multiple times by Assistant Track Supervisor J. A. Brewster to operate the dump truck and refused to do so, was capricious, excessive, harsh and unwarranted (Carrier’s File MW-DEAR-17-98-LM-636 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant R. Hanratty shall now be reinstated to active duty with all rights and benefits restored and all time lost paid in full at his respected hourly rate.”

FINDINGS:

Upon the whole record and all of the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other case.

After thoroughly reviewing and considering the record and the parties’ presentations, the Board finds that the claim should be disposed of as follows:

Claimant in this matter at the time of the incident giving rise to this dispute was assigned as a non-CDL Trackman headquartered out of Cleveland, OH. At his crew’s morning meeting on August 10, 2017 the Assistant Track Supervisor assigned Claimant to operate the crew’s rotary dump truck for the day. The Claimant stated that he would not operate the dump truck because he was not qualified and did not have rights on that machine. Claimant also expressed that “He did not feel safe to operate the dump truck”.

The Assistant Track Supervisor said “fine, don’t run it” and assigned another worker to the dump truck. The Claimant was instructed to take the employee who would be operating the dump truck to a location to pick the truck up.

The Assistant Track Supervisor testified that he wanted to talk to Claimant after the meeting, but Claimant and the employee assigned to go with him and bring the dump truck back had already left. The Assistant Track Supervisor called the other employee with Grievant and

told him to pull into a local restaurant and wait for him. The Assistant Track Supervisor continued that he met the two employees at the restaurant and instructed Claimant that he would operate the rotary dump truck and Claimant said no. The Assistant Track Supervisor then removed Claimant from service for insubordination.

Claimant was summoned to a formal investigation held on September 12, 2017 to determine his responsibility, if any, with insubordination and failure to follow instructions.

By letter dated September 25, 2017, the Carrier informed Claimant that he was found guilty of the charges and assessed a forty-five (45) day actual suspension.

Claim was timely and properly presented and handled by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer. The case is now properly before this Board for adjudication.

The Organization asserts that the Claimant here was denied a fair and impartial hearing because the Carrier violated Rule 30 by not responding to a letter sent to the Carrier on August 15, 2017 requesting the Hearing Officer to answer questions related to his qualifications to serve and also requesting any evidentiary materials upon which it intended to rely at the hearing.

The Board finds the Organization's assertions are without merit. No rule of the Agreement permits the Organization to present interrogatories to the Hearing Officer or obligates the Carrier to respond to such interrogatories. Moreover, there is nothing in Rule 30 or any other rule of the Agreement that requires the Carrier to supply documentary or other evidentiary matter to the Organization prior to the investigation.

Additionally, the Board has carefully reviewed the investigation transcript, the full record of this case developed on the property and the parties' arguments set forth in their respective submissions at arbitration. We find that the Claimant was afforded all contractual due process rights guaranteed by the parties' Agreement and that this matter is procedurally sound in all respects.

Turning to the merits, the Board finds that with regard to Failure to Follow Instructions that the Carrier's determination that the Claimant was guilty of that charge is supported by substantial evidence. Claimant was given an assignment to drive and operate the rotary dump truck and he refused. Claimant had already established that he was refusing to operate the dump truck because he did not have qualifications or machine rights. Although the Organization argues that Claimant's refusal to do so was a "good faith challenge" under 49 CFR 214, Subpart c, the record evidence shows that that attempted challenge was not lodged until Claimant had already been taken out of service for insubordination and not until Claimant returned to the Carrier's office.

Moreover, 49 USC 214 provides that a fundamental principal of track safety is that a roadway worker who is not entirely certain that it is safe to be on a track should not be there. In this instance, Claimant was not challenging the track protection provided for the location of the work, but rather the job assigned to him at that location.

With regard to the insubordination charge, Carrier here has a tougher row to hoe. The one exception to the "work now, grieve later" rule is the narrow exception for reasonable fear for one self's or other's safety or health.

In this instance, the Claimant stated that “he didn’t feel safe to operate the dump truck”. The problem for the Organization is that the Claimant also stated on more than one occasion and wrote in his statement that he didn’t feel safe because he did not have Eastern Region Machine Operator’s Rights and was not qualified to operate the dump truck. Those reasons do not equate to a reasonable fear for one self’s or other’s safety or health. It was further brought out through testimony at the investigation on the property that Claimant had operated the rotary dump truck on numerous prior occasions, was compensated at machine operator’s pay scale and supervision, who has sole discretion in the determination of qualifications, has deemed him qualified to operate the machine.

Mitigating Claimant’s refusal to operate the truck is the fact that there is no dispute that the truck Claimant had been assigned to operate had been having mechanical difficulties with the hi-rail gear that had, unbeknownst to the Claimant, been repaired prior to his assignment to operate the dump truck.

Given this particular set of facts, the Board finds it appropriate to reduce the discipline assessed to a thirty-day actual suspension.

Award:

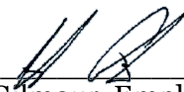
Claim sustained in accordance with the findings. The Carrier is directed to comply with the Award on or before thirty (30) days following the Award date below.



Richard K. Hanft, Chairman



Adam Lively, Carrier Member



Adam Gilmour, Employee Member

Dated at Chicago, Illinois, December 3, 2024.